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No. 83-1145

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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Questions Presented.

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the grant of summary judgment by the United States District Court for the Central District of California holding that California statutes did not create an entitlement sufficient to warrant protection under the United States Constitution?

2. Is a Federal Court bound by an unpublished decision which is not binding on any state court?

3. Does the Doctrine of Comity require abstention where the party has previously exhausted his state remedies or concurrence with an unpublished decision which is not binding on any court?

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No. 83-1145

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ROBERT SINGER,

Petitioner,

vs.

BRAD GATES, SHERIFF-CORONER, COUNTY OF ORANGE, and COUNTY OF ORANGE,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Brad Gates and the County of Orange pray that the Petition for Writ of Certiorari be denied.

Constitutional and Statutory Provisions Involved.

In addition to those cited by the Petitioner, Respondents cite: California Rules of Court, Rule 977;[1] California Business and Professions Code, Section 6076, Rule 17.[2]

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[1]California Rules of Court, Rule 977 (hereinafter referred to as "Rule 977"); Appendix 1 hereto.

[2]California Business and Professions Code, Section 6076, Rule 17; Appendix 2 hereto.

Statement of the Case.

After unsuccessfully pursuing the matter in the California State Trial Court,[3] Petitioner filed the instant case in the United States District Court for the Central District of California (hereinafter "District Court"), moving for a preliminary injunction under the Fourteenth Amendment of the United States Constitution and filing a complaint for declaratory judgment, preliminary injunction, injunction, and damages.[4]

The District Court denied Petitioner's motion for preliminary injunction[5] and cross motions for summary judgment were filed.[6] On July 6, 1982, the District Court dismissed two named plaintiffs because their claims did not present a case or controversy within Article III, Section 2, Clause 1 of the United States Constitution[7] and granted summary judgment in favor of Respondents.[8] On July 16, 1982, a notice of appeal was filed[9] and, after written briefs were filed and oral argument had on May 3, 1983, the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") affirmed the District Court's grant of summary judgment on September 23, 1983.[10]

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[3]*Association of Orange County Deputy Sheriffs, et al. v. Brad Gates, etc., et al.*, Orange County Superior Court Case No. 34-18-22, filed September 17, 1980. In this State case there were six named plaintiffs and, when originally filed in the U.S. District Court below, there were five named plaintiffs. At all times the Petitioner, Robert Singer, has remained a named plaintiff; therefore, herein the term "Petitioner" will be used unless otherwise noted.

[4]U.S. District Court Docket Entry (hereinafter "D.E.") 1.

[5]D.E. 23.

[6]D.E. 29, 30, 31, 33, 39, 40, 41, 44, and 47.

[7]*Association of Orange County Deputy Sheriffs v. Gates* (1983), 716 F.2d 733 (hereinafter referred to as "*Gates*") at 733, fn. 1; D.E. 51, pp. 3-4.

[8]*Gates, supra*, at 733; D.E. 51.

[9]D.E. 52.

[10]*Gates, supra*, at 735.

Both the District Court and the Ninth Circuit accepted all of Petitioner's allegations as true[11] and found that the statutes involved[12] did not create an expectation sufficient to create a constitutionally protected property interest[13] and, even if a protectable property interest were found, there was no infringement of a constitutionally protected liberty interest.[14]

Respondents do not agree with and object to the last three paragraphs[15] of Petitioner's "Statement of the Case." Respondents suggest that these paragraphs are not a statement of the case but are argument. Further, the statements therein are not supported by the record. Petitioner has set forth numerous allegations as facts, which are set forth only in declarations which the Court treated, for the purposes of summary judgment, as true. Yet the Courts below, assuming such declarations as true, did not find any publication, allegations, or stigmatization on the part of Respondents.[16]

Respondents request that this Court strike these paragraphs on the basis that they are argument and not a Statement of the Case supported by the record.

Summary of Argument.

Petitioner's request for certiorari is based upon an unpublished, non-precedential decision of the California Court of Appeal which may not be cited by a court or a party and is not binding on any court.

While this issue was not addressed in the published decision of the Ninth Circuit, the issue was orally argued

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[11]*Gates, supra*, at 733, fn. 2 and 735, fn. 7; D.E. 51 at p. 7, fn. 4, and p. 11.

[12]California Penal Code Sections 12027 and 12031.

[13]*Gates, supra*, at 734; D.E. 51, pp. 7-8.

[14]*Gates, supra*, at 734; D.E. 51, pp. 8-10.

[15]Petition for Writ of Certiorari filed on December 22, 1983 (hereinafter "Petition"), pp. 4-7.

[16]*Gates, supra*, at 734; D.E. 51, pp. 8-11; D.E. 23, p. 2.

before the Ninth Circuit and subsequently addressed in letters to the Ninth Circuit panel when the California Supreme Court later ordered the case depublished.

Petitioner in the present case attempts to argue that a case that has *no precedential* value, is *not binding* on *any* court, and that *may not be cited* by a court or by a party, is of some value.

There is no question that the depublished opinion of the California Court of Appeal[17] did not qualify for any form of publication or use under California Rules of Court 976(b),[18] since it was the decision of six out of seven members of the California Supreme Court that such opinion was of so little value and legal reasoning that it should be depublished.[19]

Petitioner's arguments concerning important questions of Federal law, entitlement and the Doctrine of Comity, were all before the Ninth Circuit and District Court. By this action Petitioner is only rearguing the same legal and factual issues presented to the District Court and the Ninth Circuit. This Court should not entertain reargument and rehashment of the same trite arguments already put forth by Petitioner. This is especially repugnant when the principal reason that Petitioner sets forth for a writ of certiorari is a case that has been *depublished* and cannot, therefore, be cited by a court or an attorney for *any* precedential value.

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[17]Unpublished opinion of Division I of the Fourth District California Court of Appeal; see Petition, Appendix C, pp. 52-62. Since citation of this unpublished opinion is prohibited by California statutes, rules and decisions, it will be referred to herein as "unpublished opinion."

[18]Petition, Appendix H.

[19]Minutes of the California Supreme Court, May 25, 1983, in 4 Civ. 28354, Div. 1, California Official Reports, No. 16, June 16, 1983, Minutes, p. 38.

ARGUMENT.

The Criteria Set Forth by This Court Governing Review of Certiorari Has Not Been Met.

In Rule 17.1 of Rules of the Supreme Court of the United States, this Court has indicated the character of reasons that will be considered in determining whether to grant certiorari. While this criteria does not control nor fully measure this Court's discretion, the instant Petition does not fall within the reasons set forth.

The decision of *Gates, supra,* (1) is not in conflict with the decision of any other Federal Court of Appeals on the same subject and has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, (2) has not decided a Federal question in a way in conflict with the state court of last resort, nor (3) decided a Federal question in conflict with this Court's decisions.

Petitioner has attempted to characterize the court's decision in *Gates, supra,* as both (a) contravening the interpretation of identical statutes by the Fourth District of the California Court of Appeal, and (b) in conflict with the applicable decisions of this Court and other Federal circuits. This is patently untrue as a review of the record will show.

In so characterizing, Petitioner attempts to bring before this Court, in contravention of Rule 977 of the California Rules of Court[20] and Section 6076, Rule 17, of the California Business and Professions Code,[21] an unpublished opinion of the Fourth District of the California Court of Appeal.[22] Such attempt avails Petitioner nothing. This occurs because

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[20]See footnote 1, page 1.
[21]See footnote 2, page 1.
[22]See footnote 17, page 4.

the California Court of Appeal is not "a state court of last resort" and, pursuant to decisions of the California Supreme Court, *the* state court of last resort, an unpublished opinion or decision has *no* effect and may not be relied upon by *any court* or *any party* in any action except as prescribed in Rule 977.[23] See *Knouse v. Nimocks* (1937), 8 Cal. 2d 482, 484; *Estate of Kent* (1936), 6 Cal. 2d 154, 156.

As will also be shown herein, the decision of *Gates, supra*, does not conflict with applicable decisions of this Court or of other Courts.

Petitioner's Arguments Concerning Admissions of the Entitlement Claimed Are Irrelevant and Were Fully Considered by the Courts Below.

Petitioner claims that the District Court and the Ninth Circuit refused to consider contentions pled by Petitioner in the original complaint.[24] Such allegations are patently untrue and not sustained by the record.

Both the District Court and the Ninth Circuit *explicitly* stated that they had assumed, for the purposes of the decisions below, that the allegations of the Petition were true.[25] In so doing, the District Court, in granting summary judgment, held:

> "However, none of the issues decided above is decided on the basis of disputed facts; in every instance the Court has accepted all of plaintiffs' allegation as true, and has denied the claims on legal grounds."[26]

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[23]Rule 977 (Appendix 1) prohibits citation or reliance upon an unpublished opinion except under the doctrines of law and the case, res judicata, collateral estoppel or when relevant to a criminal or disciplinary action. None of these exceptions has been put forth by Petitioner.

[24]Petition, pp. 22-25.

[25]See footnote 11, page 3.

[26]D.E. 51, p. 11.

The Ninth Circuit, in affirming, held that their "decision is based on legal as opposed to factual issues."[27]

Petitioner's Reliance on a Depublished Opinion of an Intermediate Court of Appeal in California Is Unethical and Not Permitted by California Law.

As will be shown herein, numerous decisions and Federal Circuits, along with California, prohibit the citation of a case that has been depublished or is unpublished. Instructive in the present case is the fact that Petitioner is aware of this and yet he is requesting this Court to violate such procedure. Petitioner filed with this Court an "Application for Extension of Time to File Petition on Writ of Certiorari" which was dated November 22, 1983. Attached thereto was a "Declaration of Gregory G. Petersen, Esq., etc." in which Petitioner's attorney declared under penalty of perjury (p. 3, para. 4, lines 14-20):

> "[W]eighing the concerns that the Court's opinion was inappropriate and thus implicating the duties of counsel as an officer of the Court to advise the Court of such a possibility of error, the firm had drafted a letter which would have requested the depublication of the opinion and thus, under the *Local Rules of Court*, Rule 21(c), corrected the error perceived by this declarant by removing the precedential value from the opinion."

Petitioner understands that the effect of depublishing an opinion of any intermediate court of appeal removes *all* "precedential value" from the opinion. Yet, here we find the same attorney, representing Petitioner, asking this Court to grant "precedential value" to a depublished opinion of an intermediate state court. Petitioner cites this as the main reason for reversing the Ninth Circuit. While such request flies in the face of the Rules of Professional Conduct of the

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[27]*Gates, supra*, at 735, fn. 7.

State Bar of California,[28] the California Rules of Court,[29] and precedent within the State of California, it shall be shown that it also ignores the holdings and rules of the Federal Courts.

The Court of Appeals for the District of Columbia Circuit has held that unpublished opinions, even those decided within that Circuit, do not establish precedent of any kind within the Circuit. *Environmental Defense Fund, Inc. v. Higginson* (D.C. Cir., 1979), 631 F.2d 738, 739, fn. 1. Therefore, even when the *same* Circuit has decided the *same* question within the *same* year in an unpublished decision, it will consider the issue anew. *Id.*; *see Love v. Budai* (D.C. Cir., 1981), 653 F.2d 513; *L. R. Willson & Sons, Inc. v. Donovan* (D.C. Cir., 1982), 685 F.2d 664, 669, fn. 7.

When local rules of a court, such as Rule 977, *require* that unpublished opinions are not to be cited in briefs, memorandum, or even argued to the same court as precedent, it would be improper to cite and argue such opinion to this Court. *Love v. Budai, supra*; *United States v. Kinsley* (8th Cir., 1975), 518 F.2d 665, 670, fn. 10.

Any opinion which has been ordered depublished by the California Supreme Court is not binding on any other California court of coordinate or lower jurisdiction and therefore is not binding upon the Federal Courts. *See Connecticut State Federation of Teachers v. Board of Education Members* (2d Cir., 1976), 538 F.2d 471, 485; *Johnson v. MacCoy* (9th Cir., 1960), 278 F.2d 37, 40.

The California courts have uniformly held that a decision by the California Court of Appeal, such as the unpublished opinion[30] cited by Petitioner, which has been ordered de-

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[28]See footnote 2, page 1.
[29]See footnote 1, page 1.
[30]See footnote 17, page 4.

published by the California Supreme Court under Rule 977, "is not available as precedent." *Powers v. Sissoev* (1974), 39 Cal. App. 3d 865, 872, fn. 8; *see People v. Gomez* (1972), 26 Cal. App. 3d 928, 930-931; *People v. Duncan* (1974), 40 Cal. App. 3d 940, 946, fn. 5.

The only case cited by Petitioner in support of the position that a non-published or depublished case has any value whatsoever, *Gray v. Kay* (1975), 47 Cal. App. 3d 562, is not on point, since that case *specifically* dealt with a case which was decided and ordered non-published *prior* to the adoption of Rule 977 on January 1, 1974. *Id.*, at 566.

In the Federal and California courts, it has almost been unanimously held that "unreported opinions may not be cited as authorities since they have no precedential value." *United States v. Fox* (D.C. Cir., 1972), 473 F.2d 131, 136, fn. 11; *Taylor v. Hearne* (9th Cir., 1981), 637 F.2d 689, 692; *Southern Railway Company v. Foote Mineral Company* (6th Cir., 1967), 384 F.2d 224, 228; *Chabot v. National Securities and Research Corp.* (2d Cir., 1961), 290 F.2d 657, 659; *Old Kent Bank and Trust Co. v. United States* (6th Cir., 1966), 362 F.2d 444, 450; *Curry v. Fred Olsen Line* (9th Cir., 1966), 367 F.2d 921, 925, fn. 18; *Russell v. Atlas Van Lines, Inc.* (D.C., E. Okla., 1976), 411 F.Supp. 111, 113; *American Fidelity & Casualty Company v. Indemnity Insurance Company of North America* (6th Cir., 1962), 308 F.2d 697, 700; *Knouse v. Nimocks, supra*, at 484; *Estate of Kent, supra*, at 156; *Powers v. Sissoev, supra*, at 879, fn. 8; *People v. Gomez, supra*, at 930-931; *People v. Duncan, supra*, at 946, fn. 5.

This is in accord with the decision of the other state courts. The Supreme Court of Tennessee, with respect to one of its own decisions, stated many years ago, in *Phoenix Cotton Oil Co. v. Royal Indemnity Co.* (1918), 140 Tenn. 438, 442-443, 205 S.W. 128, 130:

> "The opinion was not ordered published in our reports. It remained, therefore, under the rule of this court, only the opinion of the judge who filed it, and valuable merely for its reasoning, although the judgment rendered in the case was the judgment of the whole court.
>
> The court does not encourage the citing of the unpublished opinions of its members, and never refers to them unless compelled to do so by a reference of counsel thereto."

This Court has decided, in *King v. Order of United Commercial Travelers of America* (1948), 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. 608, that if decisions are not published, digested, or indexed, filed only where decided, binding solely upon the parties who are before the court in that particular case, and would not constitute precedent in any other case in that court or any other court of the state (*id.*, 333 U.S. at 160, 68 S.Ct. at 492) that:

> "[I]t would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court." *Id.*, 333 U.S. at 161, 68 S.Ct. at 493.

In California, decisions that are ordered depublished by the California Supreme Court pursuant to Rule 977 may not be published, digested, cited, argued or referred to. They have no weight as precedent within the state system of courts since they bind only the parties before the court in that particular case. The same division of the California District Court of Appeal that decided the case, as well as other divisions of the same District Court[11] and other District Courts of Appeal in California, do not consider them and they are not binding in any way as precedent. It would therefore be incongruous to attempt to hold the Ninth Circuit

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[11]See discussion *infra*, pp. 12-13.

bound by a decision which is not binding on *any* court in the State of California.

The practice of determining cases without a published opinion is one that has long been practiced. Each year, literally hundreds of opinions are not published.[32] For example, see cases listed at 612 F.2d 569 through 587, some of which are specifically listed as not citable for precedent.[33] In a review of publication and citation provisions of the various Circuits of the United States Court of Appeals, it was found that seven of the Circuits either did not allow or disfavored citation[34] and the only Circuit (Tenth) which allowed citation publishes a subject matter index of all its unpublished opinions that is widely circulated.[35] One of the strongest arguments for not allowing unreported, unpublished opinions to be given any weight is that it is impossible to "shepardize" these decisions to determine whether they have been reversed or overruled.[36]

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[32]78 Columbia Law Review 1167 (1978); "The Non-precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals," William L. Reynolds and William M. Richman. Appendix 3 hereto contains an updated listing of the no-citation rules of the various Circuits of the Court of Appeals of the United States which reflects that, in the five years since the review by Reynolds and Richman, the trend with the new Circuits, *i.e.*, Eleventh, Temporary Emergency and Federal Circuit, is to go along with the majority and not allow citation of unpublished opinions. Today, ten (10) Circuits do not allow citation to any unpublished opinions, two (2) Circuits disfavor citation but allow it under specified conditions, one (1) Circuit has no rule, and only one (1) Circuit allows citation. It is difficult to find that the unpublished opinions of this latter Circuit are in reality "unpublished" since a yearly index is widely available and circulated. See Appendix 3.

[33]*United States Court of Custom and Patent Appeals*, 612 F.2d 585; *United States Court of Appeals, District of Columbia Circuit*, 612 F.2d 586. The First Circuit Court of Appeals has stated that its unpublished opinions range from 45% in 1967 to 61% in 1972. Appendix B, Rules of the United States Court of Appeals for the First Circuit.

[34]78 Col. L. R., *supra*, at 1207; but *see* Appendix 3 and fn. 25.

[35]*Id.*, at 1181; Appendix 3.

[36]*Id.*, at 1185, fn. 104.

In California it has been concluded that unpublished opinions should not be cited.[37] So strong is this practice that the California Supreme Court has depublished an opinion of a California District Court of Appeals on the grounds that the opinion cited an unpublished opinion.[38] The policy and rationale supporting this practice is found in the dissent by Justice Jefferson in *People v. Valenzuela* (1978), 86 Cal. App. 3d 427, 438, wherein Rule 977 is fully discussed. Therein, Justice Jefferson discussed the reasons for the Rule, the necessity of the Rule (*id.*, at 440-441), the constitutionality of the Rule (*id.*, at 440), and the validity, authority and power of the California Supreme Court under this Rule (*id.*, at 441) which does not violate the concept of *stare decisis* (*id.*, at 442-443), or statutes (*id.*, at 443-444).

The Doctrine of Comity Does Not Require Abstention Where Petitioner Has Previously Exhausted His State Remedies or Concurrence With an Unpublished Opinion Which Is Not Binding on Any Court.

Petitioner argues that the Ninth Circuit failed to abstain to the state trial and appellate courts which would hear the case if the Federal Court abstained.[39] What Petitioner has neglected to tell this Court is that the unpublished opinion of Division I of the Fourth District of the California Court of Appeal in San Diego is not binding upon Division III, in Orange County, which would hear any future appeal from a trial court in Orange County. This occurs because even *published* decisions of the *same* District Court of Appeal in California are *not binding* upon other Divisions within the same District. *Theresa Enterprises, Inc. v. Davis* (1978),

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[37]24 Hastings Law Journal 37, 39 and 53 (1972): "The Use of Unreported Cases in California," Robert A. Seligson and John S. Warnlof.

[38]*Id.*, at 48.

[39]Petition, pp. 25-30.

81 Cal. App. 3d 940, 947, 146 Cal. Rptr. 802; 6 Witkin, Cal. Procedure, Sec. 67, p. 4580 (2nd ed., 1971).

It therefore holds that, since a published decision need not be followed by other Divisions within the same District, unpublished opinions need not be followed even within the same Division of the same District, since that opinion is no more authoritative than a brief by its author. *Curry v. Fred Olsen Line, supra*, at 925, fn. 18.

There is even a further reason why the Doctrine of Comity does not apply. There is no venue for a state trial other than the Superior Court of the County of Orange. Since Petitioner had already, in September 1980,[40] exhausted unsuccessfully his state venue, any attempt to refile would be barred by the Doctrine of Res Judicata. Petitioner has previously refused to ask Division III in Orange County of the Fourth District of the California State Court of Appeal to review this decision of the Orange County Superior Court denying relief.

The Ninth Circuit and District Courts' Decisions Are Not in Conflict With Applicable Decisions of This Court and Other Circuits.

Petitioner's argument[41] is nothing more than a reargument and rehashment of the same arguments already put forth in the District Court and Ninth Circuit. A review of the record below, including written and oral arguments before the District Court and Ninth Circuit, reveals almost each and every case or argument cited by Petitioner to this Court was previously before one or both of the courts below. Petitioner attempted to distinguish the Ninth Circuit's prior decisions of *Erdelyi v. O'Brien* (9th Cir., 1982), 680 F.2d 61, and

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[40]See footnote 3, page 2.

[41]Petition, pp. 15-22.

Jacobson v. Hannifin (9th Cir., 1980), 627 F.2d 177,[42] in both the District Court and Ninth Circuit. This was argued extensively in both Appellants' and Appellees' Opening Briefs in the Ninth Circuit and will not be repeated herein.

Petitioner's argument that he has a vested entitlement in the privilege to carry a concealed weapon,[43] flies in the face of the well reasoned rationale of the Ninth Circuit and the District Court, wherein it was stated that the statutorily required good cause "does not create a constitutionally protected interest, because it is not a 'significant substantive restriction on the basis for [the] agency's action.' *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). *See also Erdelyi v. O'Brien, supra*, ..."; *Gates, supra*, at 734.[44]

Conclusion.

It is suggested that the Petition for Writ of Certiorari should be denied and the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

ADRIAN KUYPER,
County Counsel,
EDWARD N. DURAN,
Deputy,
Attorneys for Respondents.

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[42]Petition, pp. 19-21.
[43]See footnote 41, page 13.
[44]D.E. 51, pp. 7-8.

APPENDIX 1.

"Rule 977. Citation of unpublished opinions prohibited; exceptions

(a) [Rule] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation."

APPENDIX 2.

"Rule 17. Misquotation; citations

A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional."

APPENDIX 3.

Court of Appeals of the United States, Circuit	Citation Permitted
District of Columbia	No. Rules 8(f) and 13(c).
First	No. Rules 14 and Appendix B(b)6.
Second	No. Rule 0.23.
Third	No statement.
Fourth	Disfavored, but permitted under certain specified conditions. Rule 18(d).
Fifth	Disfavored, but permitted under certain specified conditions. Rule 47.5.3.
Sixth	No. Rule 24(b).
Seventh	No. Rule 35(b)(2)(iv).
Eighth	No. Rule 8(i) and Plan, para. 3.
Ninth	No. Rule 21(c).
Tenth	Yes, but index to unpublished decisions widely circulated. Rule 17(c).
Eleventh	No. Rule 25.
Temporary Emergency	No. Rule 21(k).
Federal Circuit	No. Rule 18(a).